How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling

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In his Opinion of 8 July 2021 in Case C-132/20 *Getin Noble Bank*, AG Bobek advised the Court of Justice (ECJ) to find admissible a national request for a preliminary ruling originating from an individual who was appointed to Poland's Supreme Court (SC) on the back of manifest and grave irregularities. In this specific case, contrary to the position of AG Bobek, we submit that the ECJ must find the request inadmissible as the referring individual cannot be considered a tribunal established by law.

The nature of the problem

The referring individual at issue was appointed to Poland's SC following:

(i) the personal intervention of the Minister of Justice at the time where this individual worked at the Ministry of Justice;

(ii) a resolution adopted by a body suspended by the European Network of Councils for the Judiciary and found by both the ECJ and the European Court of Human Rights (ECtHR) not to provide sufficient guarantees of independence with this resolution furthermore recently quashed by Poland's Supreme Administrative Court (SAC); and

(iii) the deliberate and flagrant violation by the Polish President of a freezing order of Poland's SAC adopted on 25 September 2018.

These irregularities are, sadly, no longer the exception but the rule in Poland. Indeed, as aptly summarised by Adam Bodnar, Poland's Ombudsman until 15 July 2021, the multiple legislative changes adopted by Polish authorities since the end of 2015 have created "an alternative legal space […] under which the ruling majority can enact unconstitutional laws, unlawfully appoint members of the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court".

The unprecedented nature of the problem faced by the ECJ was fittingly outlined by AG Tanchev on 15 April 2021 in *W.# and M.F*, which is primarily about the manifestly irregular appointments of two individuals to two new organisational units in the SC known as the ECJ-once suspended Chamber of Extraordinary Control and Public Affairs (CECPA) and the ECJ-twice suspended Disciplinary Chamber (DC). As noted by AG Tanchev, the Polish President committed a *twofold violation of the Polish Constitution* when he manifestly and deliberately violated the SAC's order

referred above. We are therefore dealing here with several flagrant breaches “of the rules of national law governing the appointment procedure for judges” when those rules are interpreted in conformity with EU law, with the gravity of these breaches “more serious than the irregularities at issue in *Ástráðsson v. Iceland*”. It is worth stressing that these breaches also concern all of the individuals appointed to the Civil Chamber post 2017, *including the referring individual in Case C-132/20*.

In light *inter alia* of the grave irregularities which “inherently tarnished” the appointment procedure, one can expect the ECtHR to find that these individuals, sitting alone or in benches, do not satisfy the requirements relating to the right to an independent tribunal established by law. Since the same requirements also exist in EU Law, they can be similarly considered to have been manifestly violated as a matter of EU Law.

AG Bobek’s suggested solution

In his Opinion of 8 July 2021, AG Bobek suggests the ECJ to find admissible the national request for a preliminary ruling submitted by an individual who, prior to his (manifestly irregular) appointment to the SC, was a department director at the Ministry of Justice and was never a judge to begin with. For AG Bobek, the manifest and deliberate violation of the SAC order committed by the Polish President in order to make the appointment of the referring individual a *fait accompli* does not suffice to make the reference inadmissible.

Based on the starting premise that Article 267 procedures would establish judicial cooperation between courts and not between individual judges, benches or even chambers within national courts, the AG suggests the following approach: (i) the ECJ should assess admissibility in light of the nature, position and functioning of the *overall* national referring court; (ii) provided that the overall court from which the preliminary ruling request originates has not been “hijacked”, the ECJ should not find the request inadmissible.

AG Bobek admits that this may well result in a situation where the ECJ could answer questions from a body whose subsequent ruling could be held to violate Article 19(1) TEU and/or Article 47 CFR due to the possible flaws in the appointment of the referring individual and/or his alleged personal and professional ties to the Minister for Justice/General Prosecutor. Indeed, for AG Bobek, while there is “only one principle of judicial independence”, the “intensity of the Court’s review with regard to compliance with that principle and the threshold for detecting an infringement thereto” should vary.

Similarly, the AG suggests to apply the concept of “tribunal established by law” differently in situations governed by Article 267 TFEU from situations where Article 47 CFR applies as in “the latter case, the examination of the lawfulness of the composition of the bench must naturally reach the level of individual cases”. By contrast, when it comes to Article 267 TFEU, the AG is of the opinion that the ECJ ought to limit itself to an examination of the overall situation of the judicial body the reference originates from.

To sum up, AG Bobek proposes a “decoupling” when it comes to the application of the notions which Article 267 TFEU and Articles 19(1) TEU/47 CFR have in common, and the introduction of a new “hijacked” threshold to reject requests from referring bodies under Article 267 TFEU.

The problems with the suggested solution

The ECJ has repeatedly and rightly emphasised that the independence of national courts and tribunals is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU. This means that this mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

While the ECJ is yet to similarly emphasise the fundamental importance of the “established by law” criterion when it comes to the proper working of Article 267 TFEU, its case law also makes clear that this mechanism may be activated only by a body which also satisfies the requirements relating to this criterion. As a matter of ECHR but also EU law, “established by law” does not merely cover the issue of the legal basis for the very existence of the relevant tribunal but also covers the *specific composition of the bench in each case* and any other provision of domestic law which, if breached, would render the *participation of one or more judges in the examination of a case irregular*. For both the ECtHR and the ECJ, “established by law” encompasses, by its very nature, the process of appointing judges. As regards appointment decisions specifically, it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with *respect to the judges appointed*.

In addition, the ECJ has interpreted the notions, principles and requirements Article 267 TFEU, Article 47(2) CFR and Article 19(1) TEU have in common in a similar fashion. For instance, the meaning of “tribunal” under Article 47(2) CFR is the same as the meaning of “court or tribunal” under Article 267 TFEU. Similarly, the ECJ has interpreted the requirement of judicial independence on the basis of Article 267 TFEU in the light of what is set out in the second subparagraph of Article 19(1) TEU. Notably, in its landmark ruling in the *Portuguese Judges* case, the Court explicitly linked the requirement of independence under Article 19(1) with the preliminary ruling procedure. Conversely, when assessing whether a referring body is a “court or tribunal” under Article 267 TFEU, the Court itself refers to its case law regarding both Article 19(1) TEU and Article 47 of the Charter (see e.g. *Banco de Santander*).

Consequently, it would be misguided or at the very least, inconsistent with existing case law to apply the concept of court and associated criterion such as established by law or judicial independence under Article 267 TFEU differently (i.e., more laxly) from situations where Article 47(2) CFR or Article 19(1) TEU apply. Yet this is what AG Bobek seemingly suggests by advocating an approach which focuses on the referring court as a whole rather than the specific referring judge(s) or even the internal units which the referring judges may belong to.

Why is this, with respect, a flawed approach?

In a nutshell, it would lead to situations where the ECJ would accept to answer questions from national referring bodies, which the ECJ would find "established by law" for the purpose of Article 267 TFEU but whose judgments could subsequently be challenged on the ground *inter alia* that they were issued by a "judge" or a bench irregularly composed in breach of the "established by law" requirement guaranteed under Article 47(2) CFR/Article 19(1) TEU (and Article 6(1) ECHR in any subsequent eventual complaint to Strasbourg). In other words, you could end up with a body which is held by the ECJ to be enough of a "court" to submit questions to it but not enough of a "court" (due to e.g. not being established by law) to issue proper judgments as a matter of EU law and in particular, the principle of effective judicial protection.

In addition, while AG Bobek argues that his approach would not lead to different meanings of the same principles such as "established by law", in practice, we would end up with several definitions of the same principles rather than merely different types of examination or levels of scrutiny from the Court depending on the Treaty provision at play. For instance, when Article 267 TFEU is at issue, "established by law" would no longer cover the issue of the *specific composition of the bench in each case* (since the AG suggests an examination at the level of the overall court only in this situation) while in a case where Article 47 CFR is at issue, this aspect may be assessed as part of the "established by law" criterion.

Let us briefly mention some potential scenarios: AG Bobek's suggested approach would compel the ECJ to find admissible a preliminary request from irregularly appointed members of Poland's CT even though the ECtHR has already held this body not to be a "tribunal established by law" when it sits in a panel/formation including one of the individuals irregularly appointed to it by Polish President Duda. One must note in this respect that the ECtHR is likely to similarly find the Civil Chamber of the SC – where the referring individual in Case C-132/20 sits – not to constitute a tribunal established by law when it rules in formations which include any of the "judges" manifestly irregularly appointed to it (see pending Case of *Advance Pharma*). And were the ECJ to follow AG Tanchev in Case C-487/19 and make clear that a court composed of a single person of the CECPA of Poland's Supreme Court does not meet the requirements to constitute such a tribunal established by law under Articles 19(1) TEU/47 CFR, the same person would still be able to submit Article 267 requests were the ECJ to follow AG Bobek.

With respect to his proposed new hijacking test, AG Bobek suggests to look at the accumulation of issues such as "appointments to that (formally judicial) institution, the political influence being exercised over its decision-making" which "reveal a pattern in which there is no longer any independent court worth the name". In doing so, AG Bobek reintroduces the issue of problematic judicial appointment into the mix while not providing us with practical examples. It is therefore unclear for instance whether he would agree to view the unlawfully composed Polish CT as sufficiently captured to reject any Article 267 reference originating from it. The AG also does not specifically discuss the current situation of the Polish SC which is now *inter alia* presided by an "unlawful judge" whose latest action and recent public interview

could not make clearer her contempt for the ECJ's authority and her complete subservience to the executive.

Should we consider the current SC already sufficiently hijacked or should we wait for it to consist of, say, 51% of fake judges overall to reject all Article 267 requests originating from it? What is the threshold? And if there is no threshold, if this is to be assessed on a case-by-case basis, how can there be any legal certainty in the solution proposed by AG Bobek? Furthermore, AG Bobek insists on "the value of an ongoing dialogue" between courts. But once this (elusive) threshold is reached, no judge within a court would be able to request the Court for a preliminary ruling, whether they have been irregularly nominated/appointed or not. Does it not defeat the purpose of judicial dialogue even more than a judge-by-judge assessment?

In light of the above, the ECJ should not follow AG Bobek's approach because, in the short term, it would a) end up legitimising a manifestly irregularly appointed individual by artificially assessing admissibility at the level of the SC and b) pave the way for the potential rejection of all Article 267 requests, including from the few independent judges who may then still be left, should the ECJ find the SC said to be hijacked (which, in fact, has already happened). Instead, the ECJ must find inadmissible every preliminary ruling request originating from any of the individuals (some of whom were *never* judges to begin with) appointed in breach of the SAC's freezing orders on the ground that these individuals cannot be considered a tribunal established by law.
